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No. 95-1538

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROSCOE C. WEBB, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether a Tax Court decision may be vacated on the ground that it is inconsistent with a previously executed closing agreement when the taxpayer did not bring the closing agreement to the attention of either the court or the government attorneys handling the case until five months after the Tax Court decision became final.

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OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unofficially reported at 76 A.F.T.R.2d (RIA) 95-6897 and is noted at 68 F.3d 482 (Table). The opinion of the Tax Court (Pet. App. 6a-28a) is reported at 68 T.C.M. (CCH) 1106.

The prior opinion of the court of appeals (Pet. App. 29a-30a) is unofficially reported at 73 A.F.T.R.2d (RIA) 94-1209 and is noted at 17 F.3d 398 (Table). The prior opinion of the Tax Court (Pet. App. 33a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1995. The petition for rehearing was denied on January 5, 1996. Pet. App. 101a. The petition for a writ of certiorari was filed on March 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 1, 1985, the Commissioner of Internal Revenue disallowed losses exceeding $104,000 that petitioner had claimed on his 1981 income tax return as his alleged distributive share of the losses of the Far West Drilling Associates Partnership. Petitioner sought review of the Commissioner's determination by filing a petition in Tax Court on May 6, 1985 (Pet. App. 6a, 9a).

On February 3, 1988, while that case was pending, an Internal Revenue agent from the Los Angeles District Office sent a letter to petitioner that informed him that his 1982 tax return was being examined because of his investment in the Far West partnership. The letter invited petitioner to settle the tax issues relating to that investment.[1] The offer stated that petitioner

> will be allowed a deduction in the initial year of the partnership [which, for petitioner, was 1981, the year already before the Tax Court] in the amount of 75% of [petitioner's] total out-of-pocket; [petitioner] will concede all [other] deductions arising from the partnership for all years. The govern-

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[1] The Far West partnership was one of six limited partnerships that composed what the Commissioner called the "Petro-Tech National Litigation Project" (Pet. App. 6a, 9a-10a).

> ment will concede the penalties pursuant to [26 U.S.C.] 6653(a), 6659 and 6661; [petitioner] must concede the increased interest rate pursuant to [26 U.S.C.] 6621(c).

The letter also informed petitioner that the IRS "will furnish [him] with either a Form 870-AD and/or Closing Agreement" if he decided to accept the offer (Pet. App. 10a-11a).

On May 26, 1988, petitioner signed a "Closing Agreement on Final Determination Covering Specific Matters" (Pet. App. 11a). An internal revenue agent and a section chief in the Los Angeles district office of the Internal Revenue Service signed the agreement on June 3, 1988 (*ibid.*). The substantive terms of the agreement were consistent with the offer described above (*ibid.*). There is no indication in the record that the revenue agent who sent the offer knew that petitioner's 1981 tax year was then involved in a case pending before the Tax Court (*id.* at 11a n.6). And, the government attorneys handling the Tax Court litigation "apparently had no knowledge of the existence of the closing agreement" at that time (*id.* at 12a n.9). Indeed, petitioner previously had declined to accept a settlement offer made by the attorneys handling the Tax Court case, and petitioner had been informed that that offer would not be renewed (*id.* at 9a-10a).

On June 8, 1988, the Tax Court set August 8, 1988, as the trial date for petitioner's case. Prior to trial, the Commissioner obtained leave to file an amended answer to assert that penalties should be imposed against petitioner under 26 U.S.C. 6653(a) and 6659 and additional interest imposed under 26 U.S.C. 6621(c) (Pet. App. 12a).

Petitioner has resided in California throughout this litigation (Pet. 3-4; Pet. App. 42a). He was subpoenaed to testify at trial by attorneys from the Manhattan District Counsel's Office of the Internal Revenue Service (the attorneys handling the Tax Court case) and appeared and testified at the trial (Pet. App. 12a). Petitioner did not bring the closing agreement to the attention of the Tax Court or the government attorneys (*ibid.*). There is also no evidence that his New York counsel in the Tax Court case was aware of the closing agreement (Pet. 4-5; Pet. App. 12a)).[2]

The Tax Court sustained the Commissioner's determination. The court found that the Far West partnership was "not engaged with an actual and honest objective of making a profit within the meaning of [26 U.S.C.] section 183" (Pet. App. 86a). The court further held that petitioner was liable for penalties under 26 U.S.C. 6653(a) and increased interest under 26 U.S.C. 6621(c) (Pet. App. 88a, 91a, 99a-100a).

The Tax Court entered its decision on April 10, 1991. No appeal was taken within the 90 days provided by 26 U.S.C. 7483 (Pet. App. 6a). Pursuant to 26 U.S.C. 7481(a) and 7483, the Tax Court decision therefore became final on July 9, 1991 (Pet. App. 2a, 22a).

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[2] Although petitioner asserted that he did not understand the significance of the closing agreement, the Tax Court pointed out in ruling on petitioner's motion to vacate that petitioner "is a highly educated person (a surgeon) with knowledge of business and financial affairs" (Pet. App. 25a). The court stated that it "does not accept his explanation that he was unable to comprehend the meaning and consequences of the closing agreement at the time he executed it" (*ibid.*).

2. On December 27, 1991—more than eight months after entry of the decision—petitioner obtained new counsel and filed a motion for leave to file a motion to vacate the decision (Pet. App. 12a). In that motion, petitioner informed the Tax Court for the first time of the existence of the closing agreement. Petitioner's new counsel also informed government counsel of the existence of the agreement on December 2, 1991 (*id.* at 12a n.9).

In this motion, petitioner asserted that the Tax Court lacked jurisdiction over the case and could not "disregard[]" the closing agreement (Pet. App. 12a-13a). The Commissioner responded that the Tax Court's decision was not jurisdictionally infirm and that, in any event, the closing agreement was invalid because it was executed by IRS personnel lacking sufficient authority to bind the IRS (*id.* at 13a). In support of the latter contention, the Commissioner submitted that, under the applicable delegation orders, the IRS personnel who executed the closing agreement did not have authority to settle cases that had been docketed in the Tax Court (*ibid.*).

3. The Tax Court denied petitioner leave to file his untimely motion to vacate (Pet. App. 7a, 31a-32a). The court reasoned that its decision had become final before the motion was filed and that petitioner had failed to show any appropriate legal or factual basis for vacating a final decision (*ibid.*). On appeal, the court of appeals held that, because petitioner had alleged the absence of subject matter jurisdiction, the Tax Court should have filed the motion to vacate and considered it on the merits (*id.* at 29a-30a). The court of appeals remanded the case for that purpose (*ibid.*).

4. On remand, the Tax Court filed petitioner's motion to vacate and then denied it on the merits.

The court determined that the closing agreement was not binding on the Commissioner—and was therefore unenforceable—because the individuals who executed the agreement on the Commissioner's behalf lacked authority to execute closing agreements with respect to cases that were docketed in the Tax Court.[3] The court further held that it could not vacate a final decision even if the closing agreement were valid because a closing agreement that is not timely brought to the court's attention does not deprive the court of jurisdiction to enter a decision in a pending case (Pet. App. 14a-28a).

5. The court of appeals affirmed. The court assumed, without deciding, that the closing agreement was valid. But the court held that closing agreements are not jurisdictional and do not deprive courts of the *power* to determine pending tax disputes. The court further held that, even if a closing agreement imposed a jurisdictional limitation on the Tax Court, a final judgment is not subject to collateral attack on that basis. The court noted (Pet. App. 4a) that, in *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), this Court concluded that a challenge to a court's jurisdiction was barred when the plaintiff failed to attack jurisdiction on direct review and instead raised the issue only as a collateral attack on the judgment after it became final.

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[3] The Tax Court determined that the delegation orders were "unambiguous" (Pet. App. 17a) and "clear" (*id.* at 19a) in denying such authority to the officers who signed the agreement involved in this case.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. In the absence of an appeal, a Tax Court decision becomes final 90 days after entry of the decision. 26 U.S.C. 7481, 7483; *Harbold* v. *Commissioner*, 51 F.3d 618 (6th Cir. 1995). The Tax Court entered its decision in this case on April 10, 1991 (Pet. App. 6a). No appeal was taken within the 90 days permitted by 26 U.S.C. 7483. The decision thus became final on July 9, 1991 (Pet. App. 6a).

Once a Tax Court decision becomes final, neither the Tax Court nor any other court has jurisdiction to reconsider it. *Lasky* v. *Commissioner*, 352 U.S. 1027 (1957); *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225 (1944); *Harbold* v. *Commissioner*, 51 F.3d at 621-622. In *Billingsley* v. *Commissioner*, 868 F.2d 1081 (9th Cir. 1989), however, the Ninth Circuit concluded that the Tax Court could entertain a belated motion to vacate a decision that was entered without jurisdiction. See also *Abeles* v. *Commissioner*, 90 T.C. 103, 105 (1988). But, a challenge to the legal validity of an otherwise final Tax Court decision on jurisdictional grounds may be maintained only if the decision is "void." *Brannon's of Shawnee, Inc.* v. *Commissioner*, 69 T.C. 999, 1001 (1978); see *Billingsley*, 868 F.2d at 1085; Fed. R. Civ. P. 60(b)(4). "In the interests of finality, the concept of void judgments is narrowly construed." *Jones* v. *Giles*, 741 F.2d 245, 248 (9th Cir. 1984). See 7 James Wm. Moore, *Moore's Federal Practice* ¶ 60.25[2] (2d ed. 1995). This principle applies to Tax Court decisions, as it

does to other types of judgments, because the assessment and collection procedure is directly dependent upon the finality of the decision. See *Denholm & McKay Co.* v. *Commissioner*, 132 F.2d 243, 248 (1st Cir. 1942).

b. The decision entered by the Tax Court in this case was not "void" for lack of jurisdiction. There is no dispute that the Tax Court properly acquired jurisdiction when petitioner commenced this case by filing a timely petition for review of the notice of deficiency issued by the Commissioner. More than five months after the Tax Court's decision became final and non-appealable, however, petitioner filed a motion to vacate the court's decision, claiming that the Tax Court lacked jurisdiction over the case (Pet. App. 12a-13a).

That motion was correctly denied. Section 7121(b)(2) of the Internal Revenue Code provides that "in any suit, action or proceeding, such [closing] agreement * * * shall not be annulled, modified, set aside, or disregarded." 26 U.S.C. 7121(b)(2). The specific terms chosen by Congress—annul, modify, set aside, and disregard—do not deprive courts of jurisdiction; instead, they instruct courts how to exercise their jurisdiction. When, as in the present case, a closing agreement is not called to the attention of a court that properly possessed and exercised jurisdiction over the case, the court could not be said to have "annulled, modified, set aside, or disregarded" the agreement. Cf. *Browning* v. *Commissioner*, 33 T.C.M. (CCH) 429, 430 (1974) ("an agreement by the parties on the amount of the deficiencies does not deprive [the Tax Court] of power to determine the amount of the deficiencies, if any, unless and until the settlement agreement is filed

…n the Court and decision is entered in accordance therewith").

c. Petitioner errs in asserting (Pet. 9) that a conflict exists between the decision in this case and the 1930 decision of the Court of Claims in *Bankers' Reserve Life Co.* v. *United States*, 42 F.2d 313, cert. denied, 282 U.S. 871 (1930). In *Bankers' Reserve*, the court interpreted the predecessor to Section 7121(b)(2) as a jurisdictional provison when the closing agreement had been pled as a defense prior to the disposition of the case. The court stated that a "suit * * * brought for the express purpose of setting aside the [closing agreement] * * * is prohibited by the positive provisions of [the predecessor of Section 7121(b)(2)]." 42 F.2d at 315. The court in *Bankers' Reserve* did not address the application of this statute in the context of the present case, where the taxpayer properly commenced the case in Tax Court and where the agreement was not brought to the attention of the court until after its decision on the merits of the tax dispute became final. The decision of the court of appeals on the facts of this case thus does not conflict with the decision entered upon the different facts that existed in *Bankers' Reserve*.

As petitioner points out (Pet. 10-11), in *Aetna Life Insurance Co.* v. *Eaton*, 43 F.2d 711, cert. denied, 282 U.S. 887 (1930), the Second Circuit disagreed with the reasoning of *Bankers' Reserve*. In *Aetna Life*, the court held that the statute is *not* jurisdictional but instead affords only an affirmative defense. 43 F.2d at 715. The *Aetna Life* case, like *Bankers' Reserve* (but unlike the present case), involved a situation where the closing agreement was brought to the court's attention *before* its decision on the merits became final. The decisions in *Aetna Life* and *Bankers'*

Reserve both recognize that an agreement brought to the court's attention *before* its decision becomes final must be respected. But, neither of those cases involves application of the statute to the situation presented in this case, where the decision on the merits was entered by a court that properly possessed jurisdiction and that acted without knowledge of the existence of the closing agreement. The decision in the present case thus does not conflict with *Bankers' Reserve* or with any other appellate decision.[4]

2. In addition to holding that 26 U.S.C. 7121(b) is not a jurisdictional provision, the court of appeals further held that a final decision of the Tax Court is not subject to collateral attack for jurisdictional reasons (Pet. App. 3a-4a, citing *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940)). Petitioner contends that the court of appeals erred in relying on *Chicot County Drainage*, asserting that "*Chicot County Drainage* cannot stand for the proposition that jurisdictional challenges are barred, even if not raised" (Pet. 20).

It is well settled, however, that res judicata "precludes the parties or their privies from relitigating issues that were *or could have been raised.*" *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) (emphasis added, citing *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1877)). As this Court observed in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982):

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[4] Moreover, the paucity of decisions on this issue reflects that the issue lacks administrative importance.

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal. See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938).

See also 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure*, § 2862, at 331 (1995) ("[A] court's determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated and decided, *or if a party had an opportunity to contest subject matter jurisdiction and failed to do so.*" (emphasis added; footnote omitted)).

Petitioner further errs in claiming (Pet. 18, 23) that the decision in this case conflicts with other decisions in which a final judgment was later held to be void. That contention ignores the factual distinctions that exist among the various cases. A jurisdictional attack on a judgment is routinely rejected if the record is sufficient to show that the court originally had subject matter jurisdiction over the case. *Jackson* v. *Irving Trust Co.*, 311 U.S. 494 (1941); *Honneus* v. *Donovan*, 691 F.2d 1 (1st Cir. 1982). A judgment is void only when the record affirmatively establishes that the court did not acquire jurisdiction. See, *e.g.*, *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920); *Watts* v. *Pinckney*, 752 F.2d 406 (9th Cir. 1985). In the present case, the record demonstrates that the Commissioner

issued a timely notice of deficiency to petitioner and that petitioner filed a timely Tax Court petition (Pet. App. 9a, 23a-24a). The record thus affirmatively establishes that the Tax Court properly acquired jurisdiction in this case.[5] The decision of the court of appeals properly applies well-established principles and does not conflict with any other appellate decision.

3. Petitioner expresses the concern that upholding the decision in this case would encourage parties "to litigate settled matters in the hope that a better result would be obtained and that the other party would fail to timely assert his/her rights under the closing agreement" (Pet. 25). That contention is facially implausible. It is petitioner who knowingly proceeded to litigate his claim after reaching a pertinent closing agreement (that emanated from an audit for a different tax year) and who failed to bring that agreement to the attention of counsel or the court. While there is no indication that petitioner's counsel in the Tax Court was aware of the closing agreement, petitioner (who signed the agreement) was unquestionably aware both of the closing agreement and of the fact that he had not disclosed that agreement in the course of the pending Tax Court case. As the courts below concluded, this case involves a litigant who "who had a duty to the Court

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[5] Petitioner's reliance (Pet. 20) on *United States* v. *Walker*, 109 U.S. 258 (1883), is misplaced. The record in that case affirmatively established that the court lacked subject matter jurisdiction to provide the relief that was granted. See *id.* at 266 (noting that lack of jurisdiction was "app[arent] from the pleadings"). Petitioner, by contrast, seeks to inject new facts into the record after the decision against him became final. That effort was properly rejected.

* * * to disclose the existence of the closing agreement" (Pet. App. 25a) (footnote omitted)) and who failed to carry out that duty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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